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IN THE

Supreme Court of the United States

OCTOBER TERM 1968

No. 1254

STRACHAN SHIPPING COMPANY AND
TEXAS EMPLOYERS' INSURANCE ASSOCIATION,
Petitioners

vs.

R. J. SHEA, DEPUTY COMMISSIONER OF LABOR, AND
LESTER NEHRING,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SWEENEY J. DOEHRING
ED BLUESTEIN, JR.
D. DUDLEY OLDHAM
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FIDELITY PRINTING COMPANY, INC., HOUSTON

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VS.

R. J. SHEA, DEPUTY COMMISSIONER OF LABOR, AND
LESTER NEHRING,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit initially rendered in the above case on January 13, 1969.

OPINIONS BELOW

The compensation order issued under the Longshoreman's and Harbor Workers' Compensation Act by R. J. Shea, Deputy Commissioner, Bureau of Employees' Compensation, Eighth Compensation District (R. 31-36) is unreported, but is printed as Appendix A to this Petition,

infra, pages 1a-5a. The final decree of the United States District Court for the Southern District of Texas, Houston Division, (R. 15-16) is unreported also but is printed as Appendix B to this Petition, *infra,* pages 12a-13a. The United States District Court's earlier memorandum (R. 37-43) is also unreported, but is printed as part of Appendix B to this Petition, *infra,* pages 6a-12a. The opinion of the United States Court of Appeals for the Fifth Circuit, is unreported, but is printed as Appendix C to this Petition, *infra,* pages 15a-17a.

JURISDICTION

The judgment sought to be reviewed from the United States Court of Appeals for the Fifth Circuit was originally entered on January 13, 1969, *infra.* Appendix C, pages 18a-19a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C.A. § 1254 (1).

QUESTIONS PRESENTED

1. Whether a Deputy Commissioner has acted in accordance with law under the Longshoreman's and Harbor Workers' Compensation Act when he finds that a claimant has sustained an injury at a given time and place, and makes an award based thereon, where at a prior adjudication in a personal injury suit for damages a jury has found as a fact that the claimant did not sustain an injury on the time and place in question and a judgment has been entered pursuant to such finding?

2. Whether the alleged "statutory policy" of partiality announced by the Court of Appeals below for administrative hearings actually exists, and if it does whether it meets the due process requirements of the Fifth Amendment?

CONSTITUTION PROVISION AND STATUTES INVOLVED

1. The Fifth Amendment to the Constitution of the United States (Appendix D, *infra,* page 20a).

2. The Longshoremen's and Harbor Workers' Compensation Act as amended, 33 U.S.C.A., Sections 903(a), 914 (h), 920 and 923 (a) (Appendix D, *infra,* pages 20a-22a).

3. The Administrative Proceduce Act as amended, 5 U.S.C.A., Section 556(a-e). (Appendix D, *infra,* pages 22a-23a).

STATEMENT OF THE CASE

This case involves an appeal from an award of compensation benefits (Appendix A, *infra,* pages 1a-5a) made by the Deputy Commissioner administering the Longshoreman's and Harbor Workers' Compensation Act, Title 33 U.S.C. §901 et seq.

On or about January 9, 1964, Lester Nehring was in the employ of Strachan Shipping Company aboard the SS RIO BERMEJO upon the navigable waters of the United States in Houston, Texas. While working aboard the vessel, Nehring alleges that he sustained personal injuries when he slipped and fell aboard the vessel. Nehring instituted a third party action against the owner and operator of the SS RIO BERMEJO, in which suit his employer, Strachan Shipping Company, was impleaded by the vessel owner for indemnity. Nehring also claimed compensation benefits under the Longshoreman's and Harbor Workers' Compensation Act in separate proceedings pursuant to that statute.

The third-party suit was tried to conclusion in the United States District Court for the Southern District of Texas, being Civil Action No. 66-H-65, styled *Lester Nehring* v. *Empresa Lineas Maritimas Argentinas* v. *Strachan*

Shipping Company. A final judgment was entered on March 9, 1967, signed by Judge Ingraham (Appendix C, *infra,* pages 12a-13a). Based upon the jury's finding of fact that Lester Nehring did not sustain an injury while working on board the SS RIO BERMEJO on or about January 9, 1964, the judgment denied Nehring any recovery.

Following entry of this adverse judgment in his civil action against the vessel, Nehring's claim for compensation before the Deputy Commissioner came on for hearing. First and foremost, the claim was resisted on grounds of res judicata and collateral estoppel, based upon the jury's finding of fact in the prior judicial proceeding that Nehring did not receive an injury while aboard the SS RIO BERMEJO on or about January 9, 1964. A formal hearing was held before the Deputy Commissioner and thereafter the Deputy Commissioner's compensation order and award was issued on August 21, 1967 (Appendix A, *infra,* pages 1a-5a). Contrary to the finding of the jury in the prior adjudication and contrary to the judgment entered by the United States District Court, the Deputy Commissioner found that Lester Nehring did in fact sustain an injury on January 9, 1964, while aboard the SS RIO BERMEJO. The Deputy Commissioner's compensation order and award announced his refusal to give weight and affect to the judgment of the United States District Court and a Motion to Dismiss the claim for compensation on the basis of the prior adjudication was denied (R. pages 33-34).

Petitioners perfected their appeal to the United States District Court (R. pages 1-9) after the entry of the Deputy Commissioner's order. The question of law was brought on for hearing with the result that the Court below entered a final decree on December 26, 1967, sustaining the Deputy Commissioner's Motion for Summary Judgment (R. pages 17-18) and denying Appellant's Motion for Summary Judg-

ment (R. pages 15-16). The final decree followed the United States District Court's earlier memorandum dated December 8, 1967 (R. pages 37-43).

Petitioners perfected their appeal to the United States Court of Appeals for the Fifth Circuit (R. pages 46-52). The United States Court of Appeals for the Fifth Circuit entered a final decree on January 13, 1969, affirming the judgment of the United States District Court for the Southern District of Texas (Appendix D, *infra,* pages 12a-13a). In its opinion, the United States Court of Appeals for the Fifth Circuit announced that in a civil suit the petitioner must prove his case by a preponderance of the evidence, but that in a hearing before the Deputy Commissioner, all doubtful questions of fact were to be resolved in favor of the injured employee, and the court affirmed.

REASONS FOR GRANTING THE WRIT

1.

This case involves an important issue regarding the relationship between a federal administrative agency and the federal judiciary in the determination of facts.

2.

This case involves an erroneous construction of two major federal statutes, i.e., the Longshoreman's and Harbor Workers' Compensation Act and the Administrative Procedure Act.

3.

The Court below has established standards in administrative proceedings which deprive petitioners of their property without minimal fairness as required by the due process clause of the Constitution.

4.

The identical important issues here presented are pending on petition for writ of certiorari in No. 1239, October Term, 1968, *Young & Company, et al, Petitioners* v. *R. J. Shea,* Deputy Commissioner of Labor, et al, Respondents.

ARGUMENT

I

THE DEPUTY COMMISSIONER SHOULD BE REQUIRED TO ACCEPT FACTS FOUND IN FEDERAL COURTS

The broad purpose of res judicata and collateral estoppel is the elimination of needless repetitive litigation. Both doctrines are utilized in situations such as our present case to prevent the relitigation of matters that had been previously judiciously determined and the common objective of both doctrines is judicial finality. The doctrine of collateral estoppel is, in fact, a narrow refinement of the broad doctrine of res judicata, and collateral estoppel is the terms most appropriate to this petition.

The issue submitted to the jury in Lester Nehring's personal injury suit in federal court was (R. 23):

> "Interrogatory Number One.
>
> Did the Plaintiff, Lester Nehring, sustain an injury while working aboard the RIO BERMEJO on or about January 9, 1964?"

The jury replied:

> "No."

Yet only a few months later, the Deputy Commissioner found as a fact (R. 31-32) that:

> "2. On said day (January 9, 1964) the claimant (Lester Nehring), while performing service as a long-

> shoreman aboard the vessel M/S 'RIO BERMEJO' upon the navigable water, sustained injury resulting in disability."

Lester Nehring had the burden of proof in the United States District Court to establish that he sustained an injury on or about January 9, 1964 aboard the SS RIO BERMEJO before he could recover in that litigation. He also had the burden of proof of showing that an injury occurred in order to be successful in his claim before the Deputy Commissioner for compensation under the Longshoreman's and Harbor Workers' Compensation Act.

> "Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States. . . . "[1]

Section 920 of the Act states that in any proceeding it shall be presumed, in the absence of substantial evidence to the contrary, that the claim comes within the provisions of the Longshoreman's and Harbor Workers' Compensation Act. However, as the case of *Furlong* v. *O'Hearne,* 144 Fed. Supp. 226, 271 (D. Md. 1956), affirmed, 240 Fed. 2d 958 (4th Cir. 1957) makes clear at page 271:

> "The presumption in Section 920(a) does not relieve the claimant of the necessity of proving an injury . . ."

To the same effect are *Sykes* v. *O'Hearne,* 181 Fed. Supp. 368, 371 (D. Md. 1960); *Gooding* v. *Willard,* 209 Fed. 2d 913 (2nd Cir. 1954) and *Eschbach* v. *Contractors, Pacific Naval Bases,* 181 Fed. 2d 860, 864 (7th Cir. 1950).

When Nehring did not sustain the burden of proving an injury all other issues became moot in the third party ac-

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[1] 33 U.S.C.A. 903(a); Appendix D, *infra,* page 20a.

tion just as they would have become moot in the compensation claim had the Deputy Commissioner applied the doctrine of collateral estoppel based on the jury's response to Interrogatory Number One.

The parties that were involved in the claim before the Deputy Commissioner under the Longshoreman's and Harbor Workers' Compensation Act were in all material respects the same parties that were involved in the third party action, with the exception that the vessel owner was not involved in the claim before the Deputy Commissioner. There was, therefore, mutuality between the various parties. The third party action involved Strachan Shipping Company as a third-party defendant. The vessel owner had impleaded Strachan to recover indemnity for any amounts paid to Lester Nehring. Texas Employers' Insurance Association was in privity with Strachan Shipping Company as its compensation and employer's liability insurance carrier.

In addition to mutuality, some courts require the parties to have been adverse in the prior adjudication. There can be little doubt that Strachan Shipping Company's interest in the third party action was absolutely adverse to Lester Nehring's position. The law of indemnity of *Ryan Stevedoring Company* v. *Pan-Atlantic S.S. Corp.*, 350 U.S. 124, 100 L. Ed. 130, 76 S. Ct. 232 (1956), is such that any recovery that Nehring obtained from the vessel owner might well have been passed on to Strachan. Judge John R. Brown's statement in his dissenting opinion in *Strachan Shipping Company* v. *Melvin*, 327 Fed. 2d 83, 90 (5th Cir. 1964) demonstrates the adversity of the claimant and the stevedoring company in a third-party action.

This Court has recently decided the case of *Banks* v. *Chicago Grain Trimmers Association, Inc., et al*, 390 U.S. 459, 20 LE 2d 30, 88 S. Ct. 1140 (April 1, 1968) reversing

369 Fed. 2d 344 (7th Cir. 1966). The Seventh Circuit Court of Appeals had held that a hearing before a Deputy Commissioner was of a judicial nature, and therefore the doctrine of res judicata would be applied so as to preclude the relitigation of an issue during the course of a second hearing. The Seventh Circuit did not discuss the effect of Section 922 of the Longshoreman's and Harbor Workers' Compensation Act[2] upon the principle of res judicata and it was on this point that this Court decided the case. This Court's opinion pointed out in footnote 3 that it did not reach the contention of whether the doctrine of res judicata applied to administrative compensation cases generally, and that issue is now squarely presented.

In our present case, it is obvious from reading the Deputy Commissioner's order that he did not consider the hearing as being for the purpose of modifying an earlier fact finding. The Deputy Commissioner stated in his award (R. 33-34) that the doctrine of collateral estoppel and res judicata was "inapplicable and should not prevent claimant from pursuing claim for compensation under the Longshoreman's and Harbor Workers' Compensation". The Deputy Commissioner determined he could make an independent, and contrary, finding on a previously adjudicated question of fact.

The judgment rendered in the United States District Court in Civil Action Number 66-H-65, based upon the jury's verdict, conclusively established that Lester Nehring did not sustain an injury at the time and place in question. This judicially established fact deserves recognition, not only in the courts of law throughout the land, but also by

[2] Section 922 provides that a deputy commissioner may, within a one year period of time, review and modify an award on the ground of change in the claimant's condition or because of a mistake in the determination of fact.

the office of the Deputy Commissioner, Bureau of Employee's Compensation, U. S. Department of Labor, in a subsequent administrative proceeding.

II

DUE PROCESS IS NOT ACCORDED BY A HEARING EXAMINER PARTIAL TO ONE SIDE[3]

The alleged "statutory policy" of resolving all doubtful questions of fact in favor of the injured employee announced by the Court of Appeals below is not only unconstitutional, but it does not even exist. In fact, the "statutory policy" is exactly the opposite of that which the Court of Appeals has asserted it to be!

Nothing in the Longshoreman's Act supports this assertion, and there are at least two separate sections of the Longshoreman's Act which demonstrate beyond any question that no such policy of partiality is expressed in or can be implied in the Act:

1. Section 14(h) provides that the Deputy Commissioner shall "hold such hearings, and take such further action as . . . will properly protect the rights of *ALL* parties." (Emphasis supplied)[4]

2. Section 23(a) provides that the Deputy Commissioner is to conduct his hearings "in such manner as to best ascertain the rights of the parties."[5]

On what basis can it be said that a statute which affirmatively provides that the administrative hearing officer is to

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[3] The argument which follows is taken entirely from the petition in No. 1239, October Term 1968, Young & Company v. Shea, though not in exactly the same sequence. The identical issues are presented in these petitions, and both involve Fifth Circuit opinions.

[4] 33 U.S.C.A. 914(h); Appendix D, *infra*, page 21a.

[5] 33 U.S.C.A. 923(a); Appendix D, *infra*, page 22a.

"properly protect the rights of all parties" requires that hearing officer to be partisan and to favor one party over his adversary? There is no basis on which to support any such "policy of partiality" under such statutory language.

But the Longshoreman's Act is not the only federal statute which affirmatively provides that no such "policy of partiality" exists. The Administrative Procedure Act, under whose provisions the Deputy Commissioner is required to conduct his hearings and make his findings, also expressly provides:

1. All administrative hearing officers, which includes Deputy Commissioners, are to perform their "functions" in an "impartial manner".[6]

2. An administrative hearing officer, which includes Deputy Commissioners, cannot issue an order "except on consideration of the whole record . . . and supported by and in accordance with the reliable, probative and substantial evidence. . . ."[7]

Congress in both Acts has plainly and unequivocally provided that administrative hearing officers are to be nonpartisan and impartial, and that their orders are to be based only on reliable, probative and substantial evidence and not on some alleged "policy of partiality". Since the alleged "statutory policy" of partiality of the Court of Appeals below does not exist, and because the actual statutory policy of the Congress, both in the Longshoreman's Act and the Administrative Procedure Act, requires the Deputy Commissioner to function in an impartial manner, Petitioners respectfully submit that this petition should be

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[6] 5 U.S.C.A. 556(b); Appendix D, *infra*, page 22a.

[7] 5 U.S.C.A. 556(d); Appendix D, *infra*, page 23a.

granted to correct this glaring error of the Court of Appeals below before it leads some other Court into the same error.

The Administrative Procedure Act by its own terms applies to all, or at least to substantially all administrative hearings conducted by the various agencies of the Federal government. To permit the holding of the Court of Appeals below to stand that the burden of proof or "standard of persuasion" is substantially less before an administrative hearing officer than it is before a jury in a court of law, creates a serious menace not only to the constitutional rights of the parties to such proceedings, but to the very existence of our constitutional system.

This Court should insure that in administrative proceedings all parties are given an opportunity to be heard by an impartial hearing officer who then determines the facts on the basis of the reliable-probative-and-substantial-evidence-upon-consideration-of-the-whole-record, not favoring one party over the other, but only determining what that hearing officer in his own impartial consideration believes to be right. To require him to favor the employee to the detriment of the employer is to make the hearing officer biased and prejudiced because it requires him to rule in favor of one party and against another when any "doubtful fact questions" exist. If this is what due process of law has become in administrative hearings as the Court of Appeals below has held, then there can be no doubt that maritime employers covered by the Longshoreman's Act no longer have any protection under the Fifth Amendment of the Constitution for they are being, and will be, deprived of their property without due process of law.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

SWEENEY J. DOEHRING
ED BLUESTEIN, JR.
D. DUDLEY OLDHAM
Counsel for Petitioners

Of Counsel:

FULBRIGHT, CROOKER, FREEMAN,
BATES & JAWORSKI
Bank of the Southwest Building
Houston, Texas 77002

CERTIFICATE OF SERVICE

I certify that copies of this petition for writ of certiorari were served on Mr. W. Jiles Roberts, Americana Building, Houston, Texas, 77002, attorney for the respondent, Lester Nehring, and on the Honorable Anthony Farris, United States Attorney, P. O. Box 61129, Houston, Texas 77061, first class postage prepaid, and on the Solicitor General and Mr. Ralph Fine, Department of Justice, Washington, D.C., 20530, attorneys for respondent, R. J. Shea, Deputy Commissioner, by air mail postage prepaid by mailing said copies to them at their last known addresses as shown above on this the ..... day of April, 1969.

SWEENEY J. DOEHRING

APPENDIX A

DEPUTY COMMISSIONER'S COMPENSATION ORDER AND AWARD OF COMPENSATION

(Caption Omitted)

Such investigation in respect to the above-entitled claim having been made as is considered necessary, and

A hearing having been duly held in conformity with law, The Deputy Commissioner makes the following

FINDINGS OF FACT

1. On January 9, 1964, the claimant above-named was in the employ of the employer above-named at Houston, Texas, in the Eighth Compensation District, established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act. The liability of the employer for compensation under the said Act was insured by the Texas Employers' Insurance Association.

2. On said day the claimant, while performing service as a longshoreman aboard the vessel M/S "Rio Bermejo" upon the navigable waters, sustained injury resulting in disability. While carrying sacks of bone meal, claimant slipped and fell, injuring his back. As a result of this injury the claimant sustained a fracture of an earlier spinal fusion and underwent a laminectomy and refusion in November of 1964 at the L4-5 level.

3. Written notice of injury was not given to the employer within 30 days but the employer had knowledge of the injury and has not been prejudiced by the lack of such written notice. The employer furnished the claimant with medical treatment, etc., in accordance with the provisions of Section 7(a) of the said Act. The average weekly wage

of the claimant at the time of injury was $116.98. This was arrived at by obtaining claimant's gross waterfront earnings for the weeks ending January 14, 1963 to January 6, 1964, $5,381.33, and dividing this figure by 46. The claimant was given credit for 6 weeks during which he was disabled by virtue of another injury during November and December, 1963.

4. As a result of the injury the claimant was paid compensation during the period January 13, 1964 to February 12, 1967, for temporary total and various rates at temporary partial disability in the total amount of $8,662.86.

5. As a further result of the injury the claimant sustained permanent partial disability to some extent and continues to be unable to perform all the substantial and material acts of his employment in the usual and customary way. The claimant's physical activity is restricted in that he must avoid heavy lifting and excessive bending and stooping. By virtue of his injury-related disability the claimant is and has been unable to perform many of the types of jobs that he had been able to perform prior to the January, 1964 injury. The claimant's wage earning capacity has, therefore, been adversely affected. He is able to perform many of the lighter types of longshore work, including "Key Jobs", and is able to obtain these jobs primarily because of his seniority classification.

Having due regard to the nature of the injury, the degree of physical impairment, his usual employment and other factors, conditions and circumstances which affected his capacity to earn wages, in his disabled condition, including the effect of such disability as it naturally extends into the future, the claimant's wage earning capacity is, in the interest of justice, fixed under Section 8(h) of the Act as $83.98 per week subsequent to February 12, 1967. From

February 13, 1967, to August 13, 1967, inclusive, 26 weeks, and continuing, claimant's weekly earning capacity was reduced from $116.98 to $93.98, a loss of $33.00. For such disability he is entitled to compensation at $22.00 per week (66⅔ percent of $33.00, his loss of earning capacity), in the sum of $572.00.

6. At the hearing held in connection with this case before the Deputy Commissioner, the employer and the insurance carrier entered a motion to dismiss the proceedings upon the grounds of "collateral estoppel" and "res judicata". The motion was predicated upon the fact that as a consequence of claimant's injury of January 9, 1964, a third party action had been instituted by the claimant in the United States District Court, Southern District of Texas, Houston Division, and during the course of the trial the jury found in answer to special interrogatories that claimant did not sustain injury while working aboard the S/S "Rio Bermejo", on or about January 9, 1964. Judgment was entered accordingly in the District Court.

Motion to dismiss this action before the Deputy Commissioner is herewith denied. It is considered that the doctrine of "collateral estoppel" and "res judicata" advanced by the employer and the insurance carrier as a bar to further proceedings are inapplicable and should not prevent claimant from pursuing claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act.

7. Accrued compensation for temporary total, temporary partial and permanent partial disability to include August 13 amounts to $9,234.86. The employer and the insurance carrier have paid $8,662.86 to the claimant as compensation.

Upon the foregoing findings of fact the Deputy Commissioner makes the following

AWARD

The employer, the Strachan Shipping Company, and the insurance carrier, the Texas Employers' Insurance Association, shall pay to the claimant compensation as follows: From January 13, 1964 to February 12, 1967, inclusive, compensation for temporary total disability and temporary partial disability at various amounts, $8,662.86; and permanent partial disability from February 13, 1967 to August 13, 1967, and continuing, 26 weeks at $22.00 per week, $572.00, or a total of $9,234.86.

The employer and the insurance carrier having paid $8,622.86 to the claimant as compensation shall pay forthwith $572.00. Subsequent to August 13, 1967, they shall continue to pay compensation to the claimant for permanent partial disability at $22.00 per week, during the continuance of said disability, subject to the limitations of the Act, or until further order of the Deputy Commissioner.

An attorney's fee of $415.00 is approved in favor of W. Jiles Roberts, Attorney, for services rendered on behalf of the claimant, ($165.00 of which is for service and witness fee, $15.00, and $150.00 for testimony of Dr. Hudgins) such sum to be a lien upon and be paid out of this award.

Given under my hand and filed at Galveston, Texas, this 21st day of August, 1967.

R. J. SHEA
Deputy Commissioner
Eighth Compensation District

PROOF OF SERVICE

I hereby certify that a copy of the foregoing compensation order was sent to the claimant, the employer and the insurance carrier at the last known address of each as follows:

By Registered Mail:

MR. LESTER F. NEHRING
7011 Kernell
Houston, Texas 77017

STRACHAN SHIPPING CO.
Cotton Exchange Bldg.
Houston, Texas 77002

TEXAS EMPLOYERS' INSURANCE ASSN.
338 South Wayside
Houston, Texas 77011

By Regular Mail:

Mr. W. Jiles Roberts, Attorney
617 Americana Bldg.
Houston, Texas 77002

Fulbright, Crooker, Freeman,
Bates & Jaworski, Attorneys
Bank of the Southwest Building
Houston, Texas 77002

Bureau of Employees' Compensation
U. S. Department of Labor
Washington, D.C. 20211

R. J. SHEA
Deputy Commissioner

Mailed: August 21, 1967

APPENDIX B

MEMORANDUM OF THE COURT DATED DECEMBER 8, 1967

(Caption Omitted)

Memorandum:

This case is an appeal from an award of compensation benefits made by the defendant, R. J. Shea, Deputy Commissioner (hereinafter referred to as Commissioner), to the defendant, Lester Nehring, pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. Sec. 901, et seq. (hereinafter referred to as Longshoremen's Act). The plaintiffs in this suit are Strachan Shipping Company (hereinafter referred to as Strachan) and Texas Employers' Insurance Association (hereinafter referred to as "insurance carrier"). The case is now before the court on cross motions for summary judgment; the plaintiffs are seeking to have the Commissioner's award set aside, the defendants are seeking to have the award affirmed.

Relevant to the claims of the parties in this suit is the case of Nehring v. Empresa Lineas Martimas Argentinas, Civ. No. 66-H-65. In the Empresa case, Nehring, as plaintiff, filed a suit for personal injuries against the vessel owner who impleaded the stevedore, Strachan, as a third party defendant. Nehring sought damages for an injury received while working on board the SS Rio Bermejo on or about January 9, 1964. The Empresa case was tried in this court before a jury beginning February 22, 1967. At the conclusion of the evidence, the case was submitted to the jury for their answers to special interrogatories. The jury did not find that the plaintiff sustained the injury of which

he complained[1] and the judgment was entered that Nehring (plaintiff) take nothing.

Following entry of judgment in Civ. No. 66-H-65, Nehring's claim for compensation under the Longshoremen's Act for the previously litigated injury came on for hearing. A formal hearing was convened befor the Commissioner and Strachan and the insurance carrier resisted the claim, asserting that the doctrines of res judicata and collateral estoppel applied because a jury in a judicial proceeding had previously found that Nehring did not suffer the injury for which he sought compensation. On August 21, 1967, the Commissioner, after a full hearing, found that Nehring did sustain an injury aboard the SS Rio Bermejo on January 9, 1964, and that the doctrines of collateral estoppel and res judicata were inapplicable. A compensation order and award was issued pursuant to the Commissioner's findings of fact and conclusions of law. This compensation order and award is now before this court for review.

The pivotal question presented is whether the Commissioner erred in refusing to apply the doctrines of res judicata and collateral estoppel. The Commissioner's decision that the doctrines of res judicata and collateral estoppel were not applicable is a conclusion of law. Unlike fact findings, an administrative determination of a question of law does not have any presumption of correctness resulting from the substantial evidence rule and must be closely scrutinized. An administrative agency's determination of law may be entitled to some weight of special considera-

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[1] The controlling issue submitted to the jury in the Empresa case was as follows:

"Interrogatory No. 1: Did the plaintiff, Lester Nehring, sustain an injury while working aboard the RIO BERMEJO on or about January 9, 1964 "

The jury answered: "No."

tion but it is not conclusive.[2] In the instant case the Commissioner has failed to set forth the basis for his determination that collateral estoppel and res judicata are inapplicable, thus, the court will consider the question as if it were presented here *ab initio*. Cf. S.E.C. v. Chenery Corp., supra note 2 at 94-95.

Like the parties, the court has not discovered any cases where the exact question presented here was decided. The plaintiffs have cited Chicago Grain Trimmers Assn., Inc. v. Enos, 369 F. 2d 344 (7 CA 1966), in support of the proposion that the doctrines of res judicata and collateral estoppel are binding on an administrative agency under the facts of this case. The case is distinguishable from the facts here because the question was whether a prior administrative determination was res judicata and barred a subsequent claim presented to the same administrative tribunal. Likewise, Shea v. Texas Employers' Insurance Assn., No. 23926, 5 CA Aug. 29, 1967, ... F. 2d ...., cited by the plaintiffs is inapposite. The decision in that case is not based on the application of the doctrines of res judicata or collateral estoppel, but on an interpretation of a portion of the Longshoremen's Act dealing with prior recovery of benefits for the same injury pursuant to a state compensation plan. The defendants place reliance on Teichman v. Loffland Bros. Co., 294 F. 2d 175 (5 CA 1961), cert denied, 368 U.S. 948, in which the facts were nearly identical with those in this case. Unfortunately the case is not the panacea which it appears to be because the alleged injury considered by the jury was not the same injury as the one for which the Commissioner granted compensation. The decision of the

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[2] Levinson v. Spector Motor Co., 330 U.S. 649, 672 (1947); S.E.C. v. Chenery Corp., 318 U.S. 80, 94 (1943); Folsom v. Pearsall, 245 F.2d 562 (9 CA 1957); N.L.R.B. v. Bell Oil & Gas Co., 98 F.2d 870 (5 CA 1938).

court was not based on a finding that the doctrines of res judicata and collateral estoppel were inapplicable.

This court is of the opinion that the jury fact findings in Nehring v. Empresa Lineas Maritimas Argentinas, supra, were not binding on the Commissioner in a subsequent claim by Nehring for compensation for the same injury. This conclusion is based on the variance in the standards of proof required to establish the facts before a jury and before the Commissioner. In the former, the facts are found from a preponderance of the credible evidence, in the latter, the congressional intent was to allow a Commissioner to make findings of fact which may be based on a less stringent standard.

The Longshoreman's Act itself sets no standard of proof which a Commissioner must be guided by in making findings of fact. However, the Administrative Procedure Act, 5 U.S.C. 501, et seq., (formerly 5 U.S.C. 1001, et seq.), is applicable to hearings held by the Commissioner pursuant to the Longshoremen's Act[3] and 5 U.S.C. 556(d) (formerly 5 U.S.C. 1006(c)) provides as follows:

> "Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. *A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence....*" (Emphasis added)

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[3] O'Leary v. Brown-Pacific-Maxon, Inc., 340 U.S. 504 (1951); Voris v. Texas Employers' Insurance Assn., 190 F.2d 929 (5 CA 1951); Strachan Shipipng Co. v. Calbeck, 190 F.Supp. 255 (S.D.Tex. 1961), aff'd, 306 F.2d 693 (5 CA 1962), cert. denied, 372 U.S. 954 (1963).

The use by Congress of the words, "reliable, probative, and substantial evidence" illustrate that the standard of proof to be applied by a hearing examiner is something other than a preponderance of the evidence. The "substantial evidence" referred to in 5 U.S.C. 556 upon which a hearing examiner must base his findings has been equated to the "substantial evidence" required by a reviewing court in affirming the findings of an agency hearing examiner. John W. McGrath Corp. v. Hughes, 264 F. 2d 314 (2 CA 1959), cert. denied, 360 U.S. 931. In the MsGrath case, at page 316, the court says:

> "5 U.S.C. Secs. 1006, 1009, define our scope of review in cases such as this, . . . They provide that no administrative order should be issued unless it is supported by 'substantial evidence'. Evidence is 'substantial' if it is the kind of evidence a reasonable mind might accept as adequate to support a conclusion."

The court in McGrath is saying in essence that a hearing examiner's findings must be based on "substantial evidence" and then proceeds to define substantial evidence. It is obvious from the definition that "substantial evidence" is different from and less stringent than "a preponderance of the evidence." In Pacific Gas & Electric Co. v. S.E.C.,[4] the court considered a petition to review an order of the Securities and Exchange Commission. Using reasoning which is applicable to the present case, the court stated that the sole restraining rule on the Commission in its fact finding was that the facts be supported by substantial evidence *even though it may not be a preponderance of the evidence.* Further support for the conclusion that the standard of proof applied by an agency hearing examiner is less stringent than a "preponderance of evidence" is found in United

[4] 127 F.2d 378 (9 CA 1942), aff'd on rehearing, 139 F.2d 298 (9 CA 1943), aff'd by an equally divided court, 324 U.S. 826 (1945).

States ex rel. Dong Wing Ott v. Shaughnessy, 116 F. Supp. 745 (S.D.N.Y. 1953), aff'd per curiam, 245 F. 2d 875 (2 CA 1957). The court in the Shaughnessy case characterizes the standard of proof required to support the findings of fact of an administrative agency as "a residuum of legal evidence". See also U. S. Health Club, Inc. v. Major, 182 F. Supp. 759 (D.N.J. 1960), rev'd on other grounds, 292 F. 2d 665 (3 CA 1961), cert denied, 368 U.S. 896. Another significant difference between a jury or a court sitting as a fact finder and the Commissioner in this case is the administrative policy which places the burden of possible error on those best able to bear it, in this case the employer and insurance carrier. Thus, in a hearing before the Commissioner, all doubtful questions of fact are resolved in favor of the claimant,[5] where as no such presumption is available to a jury operating under a preponderance of evidence standard.

From the discussion above, the court concludes that there is a difference in the degree of proof required to establish facts before the Commissioner as opposed to the degree of proof required to establish facts before a jury. Because of this difference in the degree of proof, a factual determination by the jury can afford no basis for the application of the doctrines of res judicata or collateral estoppel in subsequent proceedings before the Commissioner.[6] The doc-

[5] Friend v. Britton, 220 F.2d 820 (D.C. CA 1955), cert. denied, 350 U.S. 836; F. H. McGraw & Co. v. Lowe, 145 F.2d 886 (2 CA 1944); Hartford Accident & Indemnity Co. v. Cardillo, 112 F.2d 11 (D.C. CA 1940), cert. denied, 310 U.S. 649; Accord, B. & F. Steamboat Co. v. Norton, 284 U.S. 408 (1932).

[6] By analogous reasoning, it is well established that an adjudication of a fact in a civil proceeding can afford no basis for the application of the doctrine of res judicata or collateral estoppel in a criminal proceeding because of the difference in the degree of proof Helvering v. Mitchell, 303 U.S. 391, 397 (1938); Chantangeo v. Abaroa, 218 U.S. 476, 481 (1910); United States v. Konovsky, 202 F.2d 721 (7 CA 1953).

trines of collateral estoppel and res judicata must be confined to circumstances where the fact issue raised in the second proceeding is identical in all respects *and the applicable legal rules remain unchanged.* Commissioner v. Sunnen, 333 U. S. 591 (1948); Parker v. Westover, 221 F. 2d 603 (9 MA 1955); Bush v. Commissioner, 175 F. 2d 391 (2 CA 1949).

The court finds that the Commissioner properly declined to apply the doctrines of collateral estoppel or res judicata and further finds from the record that there is substantial evidence supporting the Commissioner's determination of facts, including the fact that the claimant suffered the injury for which he seeks compensation.

The compensation order and award will be affirmed. The clerk will notify counsel to draft and submit a judgment accordingly.

JOE INGRAHAM
United States District Judge

FINAL DECREE OF THE COURT DATED DECEMBER 26, 1967 GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

(Caption Omitted)

FINAL DECREE

The Court has considered the motions for summary judgment submitted by Plaintiffs and Defendant Deputy Commissioner, together with all memoranda and exhibits submitted by the parties, and is of the opinion that the Plaintiffs' motion for summary judgment should be denied and that the Defendant Deputy Commissioner's motion for summary judgment should be granted, and that the

Deputy Commissioner's findings, order and award are in accordance with law and supported by substantial evidence in the record of the proceedings, and it is therefore,

ORDERED, ADJUDGED and DECREED that the Plaintiffs' motion for summary judgment is hereby denied and that the defendant Deputy Commissioner's motion for summary judgment is hereby granted, and it is further,

ORDERED, ADJUDGED and DECREED that the Deputy Commissioner's findings, order and award are in accordance with law and are supported by substantial evidence in the record of the proceedings, and the award is hereby affirmed.

Done at Houston, Texas, this 26th day of December, 1967.

Joe Ingraham
JOE INGRAHAM
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

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APPENDIX C

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CURCUIT

No. 25880

STRACHAN SHIPPING COMPANY and
TEXAS EMPLOYERS' INSURANCE ASSOCIATION'

Appellants,

versus

R. J. SHEA, DEPUTY COMMISSIONER, ET AL,
Appellees.

Appeal from the United States District Court for the Southern District of Texas

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(January 13, 1969)

Before JONES and COLEMAN, Circuit Judges, and CHOATE, District Judge.

PER CURAM: In January, 1964, Lester Nehring, an employee of Strachan Shipping Company, was allegedly injured while working on board the SS RIO BERMEJO. He instituted a third party suit against the owner of the vessel to recover for the injuries he sustained. The owner in turn impleaded Nehring's employer, Strachan Shipping Company, for indemnity. The jury found that Nehring did not sustain an injury while working on board the vessel and denied recovery.

Thereafter, Nehring filed a claim before the Deputy Commissioner, pursuant to the Longshoremen's and Har-

bor Workers' Compensation Act, 33 U.S.C., §901, et seq. The Deputy Commissioner held a formal hearing and, determining that Nehring did in fact suffer personal injuries while working on board the SS RIO BERMEJO, awarded compensation.

Strachan brought action to set aside the award. The District Court granted summary judgment in favor of the Deputy Commissioner and affirmed the award.

The question is: Did the jury finding that Nehring was not injured while on board the vessel collaterally estop the Deputy Commissioner from deciding to the contrary?

The issue is identical to that presented in *Young & Co.* v. *Shea,* 5 Cir., 1968, 397 F. 2d 185, in which we held that the Deputy Commissioner was not estopped. That precedent is controlling here.

See also *Watson* v. *Gulf Stevedore Corp.,* 5 Cir., 1968, 400 F. 2d 649, and *Goins* v. *Noble Drilling Corp.,* 5 Cir., 1968, 397 F. 2d 392; petition for rehearing in *Young* and in *Watson* denied December 9, 1968, ... F. 2d .....

We again point out that the proceeding before the Deputy Commissioner is quite distinct from the ordinary civil suit before a jury. Unlike a judge in a civil suit, the Deputy Commissioner is not bound by common law or statutory rules of evidence or formal rules of procedure. 33 U.S.C., §923. In addition, certain presumptions, not elsewhere indulged, are recognized in a hearing brought in accordance with the Longshoremen's and Harbor Workers' Compensation Act. 33 U.S.C., §920.

Finally, and most significantly, the burden of proof for the petitioner in a compensation hearing is less stringent than in a civil suit. Whereas, in a civil suit the petitioner must prove his case by a preponderance of the evidence,

in a hearing before the Commissioner all doubtful questions of fact are to be resolved in favor of the injured employee. See *J. V. Vozzolo, Inc.*, v. *Britton,* D.C. Cir., 1967, 377 F. 2d 144, 147; *Friend* v. *Britton,* D.C. Cir., 1955, 220 F. 2d 820. The legislative history of the Administrative Procedure Act, 5 U.S.C., §500, et seq., cited by the appellant, is not deemed to be to the contrary.

The doctrine of collateral estoppel is inapplicable to the situation here presented. The judgment of the District Court is

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1968

No. 25880

D. C. Docket No. CA-67-H-666

STRACHAN SHIPPING COMPANY and TEXAS EMPLOYERS' INSURANCE ASSOCIATION,

Appellants,

versus

R. J. SHEA, Deputy Commissioner, ET AL.,

Appellees.

Appeal from the United States District Court for the Southern District of Texas.

Before JONES and COLEMAN, Circuit Judges, and CHOATE, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellants, Strachan Shipping Company and Texas Employers' Insur-

ance Association, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

January 13, 1969

Issued as Mandate: March 26, 1969

Recoverable Costs:

Cost of Printing Appellee, Lester Nehring's Brief	$35.38
Cost of Printing Appellee, R. J. Shea's Brief	$10.70
Cost of Printing Appelle R. J. Shea's Supp. Brief	$ 6.51
Total	$52.59

APPENDIX D

UNITED STATES CONSTITUTION

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT

(33 U.S.C.A. Secs. 901, et seq.)

§ 903 COVERAGE

(a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workman's compensation proceedings may not validly be provided by State law. No compensation shall be payable in respect of the disability or death of —

(1) A master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; or

(2) An officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof.

§ 914(h) HEARINGS

The deputy commissioner (1) may upon his own initiative at any time in a case in which payments are being made without an award, and (2) shall in any case where right to compensation is controverted, or where payments of compensation have been stopped or suspended, upon receipt of notice from any person entitled to compensation, or from the employer, that the right to compensation is controverted, or that payments of compensation have been stopped or suspended, make such investigations, cause such medical examinations to be made, or hold such hearings, and take such further action as he considers will properly protect the rights of all parties.

§ 920. Presumptions

In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary —

(a) That the claim comes within the provisions of this chapter.

(b) That sufficient notice of such claim has been given.

(c) That the injury was not occasioned solely by the intoxication of the injured employee.

(d) That the injury was not occasioned by the willful intention of the injured employee to injure or kill himself or another. Mar. 4, 1927, c.509, § 20, 44 Stat. 1436.

§ 923. Procedure before the deputy commissioner

(a) In making an investigation or inquiry or conducting a hearing the deputy commissioner shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter; but may make such investigation or inquiry or conduct such hearing in such manner as to best ascertain the rights of the parties. Declarations of a deceased employee concerning the injury in respect of which the investigation or inquiry is being made or the hearing conducted shall be received in evidence and shall, if corroborated by other evidence, be sufficient to establish the injury.

THE ADMINISTRATIVE PROCEDURE ACT
(5 U.S.C.A. Secs. 500, et seq.)

§ 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision

(a) This section applies, according to the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section.

(b) There shall preside at the taking of evidence —

(1) the agency;

(2) one or more members of the body which comprises the agency; or

(3) one or more hearing examiners appointed under section 3105 of this title.

This subchapter does not supersede the conduct of specified classes of proceedings, in whole or in part, by or before boards or other employees specially provided for by or designated under statute. The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted

in an impartial manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(e) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties. When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary. Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 386.